Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08633/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 January 2014	**On 17 January 2014**

Before

UPPER TRIBUNAL JUDGE COKER

Between

TINA OGBONNA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: no appearance by sponsor or legal representatives
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. There was no appearance by the appellant's legal representatives or her sponsor. An application for an adjournment had been emailed to the Tribunal at 15.18 the day before the hearing. Although not considered by me until 9th January, I refused the adjournment. There is no indication on the face of the email that the legal representatives have complied with Rule 21 of the Asylum and Immigration (Procedure) Rules in seeking the

adjournment; in particular the application was not notified to the respondent and furthermore I was satisfied on the basis of the content of the email that the appeal could be justly determined without an adjournment. The representatives stated that to renew the application orally would result in significant expense. They did not state that they intended to renew the application if refused and no such application was made to me. Later in the email the legal representatives stated that if the adjournment application was refused they invited the Tribunal to reach a determination on the basis of previous written submissions. This I have done, also taking into account the submissions incorporated in the email.

2. This is an appeal against a decision of a First-tier Tribunal Judge to dismiss an appeal by Miss Ogbonna against a decision by the Entry Clearance Officer dated 29 February 2012 to refuse her entry clearance as a spouse on the grounds that she did not meet the requirements of paragraph 281 of the Immigration Rules. Permission to appeal was granted on the basis that although there was no challenge to the First-tier Tribunal decision that the appellant did not meet the requirements of the rules, the judge should have considered the appeal on Article 8 grounds.

3. The First-tier Tribunal found that the appellant did not meet the requirements of the Rules as regards the language qualification and that although there was likely to be adequate accommodation without recourse to public funds the appellant could not meet the maintenance requirements. The judge did not make a finding on the sustainability of the marriage having found that there was no requirement to do so given the failure to meet the requirements of the Rules.

4. Although the grounds seeking permission to appeal sought to challenge the decision under the Rules, permission to appeal was not granted on those grounds, the decision by the First-tier Tribunal Judge being unassailable. Permission was however granted on the basis that it was arguable that the judge should have considered the appeal on Article 8 grounds.

5. The First-tier Tribunal Judge records that Article 8 was not raised. The appellant was not legally represented before the First-tier Tribunal but her spouse gave evidence on her behalf.

6. Miss Pal initially said that there was an error of law such that the decision should be set aside because of the failure of the judge to make a finding on whether the marriage was subsisting and that that may impact on the Article 8 assessment.

7. After exploring this further, however, she withdrew that view and said that at its highest, if the marriage is subsisting there would be no material error because the appellant failed to satisfy the language requirement. She refers to the case of **BB** where it was found by the Court of Appeal that the failure to meet the English language qualification did not render a decision disproportionate in Article 8 terms.

8. Article 8 can be engaged in entry clearance cases. In **Shamin Box [2002] UKIAT 02212** it was held that adjudicators as they were then known should not treat the Article 8 question in entry clearance cases whether there had been an unjustified interference with the right to private and family life but whether there had been an unjustified lack of respect for private and family life and whether in the light of the positive obligations on the UK to facilitate family reunion there has been a failure to act in the particular circumstances of the case. However similar principles should be applied as for in country cases.

9. Since then of course there has been considerable litigation and of particular relevance is **VW (Uganda) and AB (Somalia) Court of Appeal [2009] EWCA Civ 5** and of course the case of **Nagre [2013] EWHC 720** and **MF (Nigeria) [2013] EWCA Civ 1192**.

10. The issues in connection with this case are that the appellant does not meet the Immigration Rules both in terms of maintenance and her language qualification. The sponsor did not attend the hearing before me and nor was the appellant's representative present. Taken at its highest that the marriage is subsisting, there is no other evidence that was placed before the First-tier Tribunal or before me which would render this decision disproportionate. There is inadequate evidence as to maintenance and the appellant has not produced evidence in connection with her English language qualifications despite the length of time that has now elapsed. There is no specific reference to Article 8 in the grounds seeking permission to appeal the Entry Clearance Officer's decision and although the appellant was not represented, there is no indication that the sponsor was not given every assistance to present the case as he wished and there is no indication that he was prevented from putting such evidence as he could as to the marriage.

11. On this basis therefore I am satisfied that although the judge ought perhaps to have considered the issue of Article 8, the fact that he did not although amounting to a potential error of law does not render the decision unlawful because the outcome of the decision would have been the same, namely the judge would have found that the decision was not disproportionate.

12. I find that there is no error of law in the First-tier Tribunal decision such as to set aside the decision to be remade.

Signed Date 15th January 2014

Upper Tribunal Judge Coker